JD(ATL)–31–04
Greenville, SC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

FLUOR-DANIEL, INC.

and Case 26–CA–13842

INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS, IRON SHIP
BUILDERS, BLACKSMITHS, FORGERS
& HELPERS, AFL-CIO

Susan Greenberg, Esq., for the General Counsel
Melvin Hutson, for the Respondent
Michael Stapp, for the Charging Party

SUPPLEMENTAL DECISION

Statement of the Case

Jane Vandeventer, Administrative Law Judge. This case was tried on March 10 and 11, 2003, in Memphis, Tennessee. This is a supplemental compliance proceeding for the purpose of determining the remedy due three employees found by the Board to have been unlawfully discharged or denied employment by Respondent in the Board's Decision and Order, found at 311 NLRB 498 (1993). This proceeding deals with only a part of the Board's Decision and Order, that involving David Scott Bolen, John H. Coons, and Steven S. Coons. On review by the United States Court of Appeals for the Sixth Circuit, the Court enforced the Board's Decision and Order as it related to the three individuals named above, and remanded the remaining portion of the case to the Board for consideration of the issue of job availability as to the approximately 51 other discriminatees. ***NLRB v. Fluor Daniel, Inc.***, 161 F.3d 953 (6th Cir. 1998).[1]

The compliance specification herein issued on June 6, 2002, and an amended compliance specification issued on October 25, 2002. Respondent filed an answer to the amended compliance specification taking issue with certain of the allegations therein, which issues will be set forth in detail below.

[1] The remanded portion of the case has been heard and decided by an administrative law judge. See ***Fluor Daniel, Inc.***, JD 66-01 (May 11, 2001).

After the conclusion of the compliance hearing, the parties filed briefs, which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. Background

A. The Decisions of the Board and the Sixth Circuit

With respect to the three discriminatees at issue here, the Board and the Court found that Respondent had discharged David Scott Bolen (Bolen) in violation of Section 8(a)(3) of the Act, and had refused to hire John H. Coons (J. Coons) and Stephen S. Coons (S. Coons) in violation of Section 8(a)(3) of the Act. The Board ordered Bolen reinstated to his former position and J. Coons and S. Coons offered employment in the positions for which they applied, all without prejudice to their seniority and other rights and privileges. The Board further ordered Respondent to pay backpay to the three named individuals.

B. Respondent's Business

Respondent, a national general contractor, performed work for Big Rivers Electrical Corporation (BR) in 1990 at several jobsites in Kentucky. The work consisted of maintenance and repair work on electrical power generating stations while the stations were shut down. According to the record in the unfair labor practice proceeding, the work was expected to last into 1991 and 1992, but in fact ended in 1990. Respondent performed work at hundreds of other jobsites throughout the country during the period from 1990 through the time of the compliance trial.

C. The Three Discriminatees

The Board found that employee Bolen was unlawfully discharged from his employment by Respondent on May 3, 1990, and ordered him reinstated with appropriate backpay. During his employment with Respondent, Bolen performed work such as welding, ironwork, and millwright work. In his interim employment since that time, Bolen has performed, in addition, maintenance and mechanic work.

The General Counsel has calculated gross backpay for Bolen from May 3, 1990, through the third quarter of 2002, and contends that backpay eligibility continues until Respondent makes a reinstatement offer to him which meets the Board's standards. For all quarters except two in the more than twelve-year backpay period calculated thus far, Bolen was steadily employed and had interim earnings. His interim earnings exceeded his gross backpay for over ten years of that period. According to the

pleadings, concerning the quarters up to and including the third quarter of 2002, net backpay is claimed for Bolen for only seven quarters, or less than two years altogether, during 1990 and 1991, for a total of $18,442.05, plus interest.

The Board found that employees J. Coons and S. Coons were unlawfully denied employment by Respondent on April 9, 1990, and ordered them to be offered employment in the positions for which they applied with appropriate backpay. J. Coons was and is a journeyman boilermaker who completed his apprenticeship in 1979. S. Coons was and is a journeyman boilermaker who completed his apprenticeship in 1980.

The General Counsel has calculated gross backpay for J. Coons from April 9, 1990, through the third quarter of 2002, and contends that backpay eligibility continues until Respondent makes an instatement offer to him which meets the Board's standards. For all quarters in the more than twelve-year backpay period calculated thus far, J. Coons was employed and had interim earnings. His interim earnings exceeded his gross backpay for over nine years of that period. According to the pleadings, concerning the quarters up to and including the third quarter of 2002, net backpay is claimed for J. Coons for only twelve quarters, or three years altogether, for a total of $32,566.54, plus interest.

The General Counsel has calculated gross backpay for S. Coons from April 9, 1990, through the third quarter of 2002, and contends that backpay eligibility continues until Respondent makes an instatement offer to him which meets the Board's standards. For all quarters in the more than twelve-year backpay period calculated thus far, S. Coons was employed and had interim earnings. His interim earnings exceeded his gross backpay for nearly seven years of that period. According to the pleadings, concerning the quarters up to and including the third quarter of 2002, net backpay is claimed for S. Coons for only fifteen quarters, for a total of $43,579.84, plus interest.

II. Backpay Issues

A. General Counsel's Burden of Proof

The General Counsel bears the burden of proving gross backpay. This means that the General Counsel must show that he made a reasonable approximation of the gross backpay, which would have been earned by the discriminatees but for the discrimination against them. This entails showing the appropriate time period for backpay as well as a reasonable and appropriate method for calculating backpay. The Board has a well-established policy to the effect that a backpay formula which "approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances." ***LaFavorita, Inc.,*** 313 NLRB NORB 902 (1994). When any uncertainty exists in the evidence, it should be resolved against the respondent who was the wrongdoer. See ***Ryder/P.I.E./Nationwide***, 297 NLRB 454, 457 (1989), enfd. in relevant part, 923 F.2d 506 (7th Cir. 1991).

1. Backpay period Issues

a. ***Dean General Contractors*** Issue

The Board, in ***Dean General Contractors***, 285 NLRB 573 (1987), held that with regard to remedies dealing with employers in the construction industry, the Board would adhere to its standard presumption of continuing employment, and assign the burden of countering that presumption to the employer seeking to end backpay based on specific facts unique to its own situation. The case was an unfair labor practice proceeding, and so the Board, after modifying the order of the administrative law judge, left to the compliance stage the issue of whether the employer in that case had a "permanent and stable" workforce and would therefore have retained the discriminatee in its employment, or whether it would have terminated him and all other employees upon the termination of the particular project in question. The Board held that the issue had not been fully litigated at the unfair labor practice hearing. While the Board noted that "ordinarily" the issue of continuing employment of a discriminatee would be handled at a compliance proceeding, it nowhere foreclosed the consideration of such an issue during an unfair labor practice hearing where the issue was fully litigated. It is conceivable in many instances that this issue may be relevant to other issues in the unfair labor practice case, and thus to be fully explored at that time.

In the instant proceeding, the General Counsel and the Charging Party take the position that the issue of whether the discriminatees would have continued employment with Respondent was decided in the underlying unfair labor practice proceeding, and hence may not be relitigated in the instant proceeding. The Respondent takes the position that the issue was not so decided, and furthermore ***Dean General Contractors*** requires that it be handled only in the compliance stage.

In the unfair labor practice portion of this case, the Remedy recommended to the Board by the Administrative Law Judge (ALJ) in his decision, and adopted by the Board included the following paragraph:

> Obviously the Big Rivers project is over as far as Respondent is concerned since Big Rivers, rightly or wrongly, terminated its contract with Respondent because of Big Rivers' view that Respondent's job performance was poor. Respondent is a major employer, which undertakes projects throughout the United States. Bearing in mind that Respondent, after Big Rivers terminated its contract, went on to other projects in this part of the country and elsewhere and that employees in the construction industry move from jobsite to jobsite and further bearing in mind Respondent's practice of giving priority in hiring to employees who have worked for it in the past the right of the aggrieved 55 discriminatees (which includes Bolen) to reinstatement and backpay should extend beyond the termination of Respondent's contract with Big Rivers in the fall of 1990. See ***Dean General Contractors***, 285 NLRB 573 (1987).

Despite Respondent's exception to this recommended remedy, the Board adopted the recommended remedy as its own, and the Court of Appeals left this aspect of the Board's remedy undisturbed.

It is uncontested that Respondent's hiring policies were the subject of extensive evidence during the unfair labor practice hearing. In connection with the exploration of whether there had been discrimination against the applicants in issue, Respondent's witness testified extensively as to its policy of favoring for hire employees who had worked for it at other jobs. There was evidence that Respondent would notify some former employees by mail or telephone of jobsites it wanted to staff, and maintained a toll-free telephone number for former employees to call to learn of jobsites where Respondent might employ them. In this proceeding, it was reconfirmed that Respondent had rehired a large number of employees on sequential projects for decades. The fact that Respondent's policy involved terminating and rehiring an employee rather than transferring the employee directly from one job to another is not determinative. It is a matter of form rather than substance.

As the ALJ noted in the passage quoted above, it was in partial reliance upon Respondent's preferential rehire policy that he recommended the continuation of the right of the discriminatees to reinstatement and backpay beyond the termination of the BR job. As the Board adopted this remedy, and the Court of Appeals enforced the remedy without any change to this aspect of the Order, I find that the continuing nature of the backpay remedy has been decided in the unfair labor practice proceeding, and that Respondent is thus precluded from relitigating it at the compliance stage.

Even if a contrary finding were possible, and the issue were to be decided here in the compliance stage of the case, it is the Respondent's burden to show that it would NOT have continued to employ the discriminatees on the same basis it continued to employ others of its employees under its policy of preferential hire of individuals who had worked for it before. ***Cobb Mechanical Contractors***, 333 NLRB 1168, 1175 (2001). This would necessitate that Respondent show specific reasons at all its jobsites that the discriminatees did not possess the skills necessary to perform the jobs in existence there. Respondent produced no such evidence. It simply stated, relying upon evidence in the underlying proceeding, that it had employed very few of its BR jobsite employees at subsequent jobsites. Respondent adduced no evidence concerning specific lawful reasons why these discriminatees would not have been employed by it on other jobsites. Placed in the balance opposite the stipulated evidence of its policy of preferentially hiring former employees and the uncontroverted evidence in the backpay data that thousands of its employees continued to work for Respondent on a regular basis, the single fact that Respondent reemployed only some of its BR employees could not carry Respondent's significant burden of proving that it would not have continued to employ these discriminatees. Respondent's reasons for its policy of favoring employees who had previously worked for it were similar to those enunciated in ***Cobb Mechanical Contractors***, above. The employees and their skills, abilities, and productive capabilities were known to Respondent. As in that case, too, Respondent's policy of preferring to rehire its former employees is a factor which favors a finding of continuing employment.

Respondent has provided an *argument* that it would not have employed the discriminatees at other jobsites, but it has not proven any facts which would establish a reason for failing to continue to employ any of the three discriminatees. ***Cobb Mechanical Contractors***, above, 333 at 1175. I find that Respondent has not met its burden of proving the discriminatees would not have continued to be employed by it on other jobsites. In sum, I find that the backpay periods continue as alleged in the compliance specification.

b. Beginning date for Bolen

The Board found that Bolen was unlawfully discharged from his employment at Respondent for refusing to cross a picket line. The effective date of the discharge was May 3, 1990. The General Counsel began the backpay period for Bolen on the date of his discharge. Respondent claims that it had no obligation to reinstate Bolen until some later time that spring when the Union's picket line no longer existed at its jobsites, but produced no evidence of exactly when this occurred.

Respondent mistakes the proper remedy for discharged employees. Backpay for an effectively discharged striker is to be awarded from the date of his discharge rather than from the date of any offer of his to return to work, or the cessation of picketing. ***Citizens Publishing and Printing Co.***, 331 NLRB 1622, footnote 2 (2000). Once a respondent has discharged a striker unlawfully, the discriminatee is in the position of any other unlawfully discharged employee, and it then becomes the *respondent's* obligation to reinstate the employee and to pay him backpay from the date of his discharge. Respondent appears to argue that its reinstatement obligation to Bolen was the equivalent of a recall obligation to a striker. This is completely incorrect, since the Board found that Bolen had been *discharged*. In accordance with Board law, I find that the General Counsel correctly determined that Bolen's backpay period began on May 3, 1990.[2]

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[2] Respondent also claims with respect to Bolen that after his discharge, it employed no employees categorized as "millwright," which Bolen was categorized as, at the BR jobsite, and that it therefore had no job for him. The Board Order clearly states that if the discriminatee's job no longer exists, its obligation is to reinstate him to a "substantially equivalent position." As the Court of Appeals found that Bolen was entitled to reinstatement, its findings necessarily contained the implicit finding that Respondent had a job for him. The remainder of the case was remanded for just such a showing regarding other individuals. This issue was therefore decided in the underlying unfair labor practice case, and Respondent is foreclosed from reopening it. ***McGuirePlumbing & Heating***, 341 NLRB No. 29, footnote 1 (2004).

In any case, Respondent has not met its burden of showing that there was no job available which Bolen could have performed in 1990. Bolen was a skilled welder and mechanic. Respondent has not shown, and could not show, that it had no jobs, either at the BR site or at others of its many jobsites, which a person possessing Bolen's skills could perform. No evidence on this point was proffered except reference to a list of employees employed at the BR site for remainder of 1990 which contains no mention of millwrights. This bare document does not carry Respondent's considerable burden of showing that it had no work available for Bolen that he was qualified to perform in its extensive operations, or that all such jobs had been "abolished."

2. Gross Backpay Calculation Formula

Where an unfair labor practice has been committed and a backpay remedy is due, the Board holds that there is a presumption that *some* backpay is owed. In a backpay proceeding, the burden is on the General Counsel to show gross amounts of backpay due. In meeting its burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The General Counsel need not find the exact amount due – indeed that would most likely be an impossibility. ***Basin Frozen Foods, Inc.,*** 320 NLRB 1072 (1996). Certainly it is the goal of a compliance proceeding to utilize as accurate a method as possible under the circumstances of the case, and considering the information available. Where a respondent advances a competing method of calculation, the Board must decide which method would yield the most accurate approximation of backpay. ***Performance Friction Corp.***, 335 NLRB 1117 (2001).

a. Method of Calculation

In general, the General Counsel may attempt to determine the amount which would have been earned based on past earnings, based on the earnings of a replacement employee, or based on the earnings of a comparable or "representative" employee or employees (herein called comparable employees). In this case, the General Counsel has determined gross backpay for 1990 based on the replacement employee method, and for subsequent periods, based on the comparable employees method. The compliance officer credibly testified that the earnings history method was impracticable in this case since two out of the three discriminatees had no earnings history with Respondent upon which to base an estimate of backpay, and the third employee had a relatively short earnings history. The replacement employee method was utilized for the remainder of calendar year 1990, based on the BR project, and to this method Respondent has no objection.[3] Therefore, the gross backpay calculated for the three discriminatees for 1990 is found to be as set forth in the General Counsel's Compliance Specification and its pertinent amendments.[4] Furthermore, as Respondent has admitted the Interim Earnings calculations and has not contested any issues associated with these Interim Earnings, the net backpay figures for 1990 as calculated by the General Counsel are found to be the appropriate net backpay for the three discriminatees for that period.

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[3] Respondent did not contest that backpay should be calculated through the end of 1990, the end of the BR project. With regard to 1990, Respondent contested backpay due Bolen on the basis set forth and rejected above.

[4] Shortly before the compliance trial and during the trial, certain arithmetical calculations were modified based upon correction of data discovered by both parties. The corrections of the arithmetical calculations were not objected to, Respondent having preserved its overall defenses to the calculations as set forth in the decision. For Bolen, the relevant corrected backpay amounts are set forth in General Counsel's Exhibit 2. For J. Coons, the relevant corrected backpay amounts are set forth in General Counsel's Exhibit 11. For S. Coons, the relevant corrected backpay amounts are set forth in General Counsel's Exhibit 1(k).

b. Selection of Comparable Employees – 1991 and Beyond

For subsequent quarters of the backpay period, the comparable employees method was utilized. The data upon which the backpay calculations were based were provided by Respondent, but must be described. Respondent represented that the volume of data relating to its thousands of employees and hundreds of jobsites for a more than twelve-year period would be unmanageable. The parties stipulated that the backpay calculations were appropriately based upon hourly employment data for certain of Respondent's employees for five years of the backpay period: the calendar years 1996 through 2000.[5] The parties agreed that the data from this period would be extrapolated to the entire backpay period.

The parties differed, however, as to the selection method of the comparable employees group. Because of the large number of employees included in the data, only ten per cent of the total number of employees were used as the comparable employee group. The General Counsel selected from among the Respondent's employees those who were highly skilled, and who worked at a journeyman level, like the discriminatees. The General Counsel also selected employees who worked consistently throughout the backpay period, again like the discriminatees.

Respondent contended that a larger group of employees should be used, including helpers. First, none of the discriminatees was a helper. Both the Coons were journeymen, and were unlawfully denied jobs by Respondent at that level. Bolen was actually working for Respondent at a journeyman level. The General Counsel quite rightly concluded that helpers were not comparable in skill or pay level to the discriminatees. When a group of comparable employees is used as a basis for backpay calculations, they should be similar to the discriminatees, not employees in different job classifications or whose work histories are quite different from those of the discriminatees. See, e.g., ***Performance Friction Corp.***, above. I reject Respondent's contention that helpers should be included in the comparable group of employees for the purposes of hours or of wages. Such a method would result in less accurate backpay figures.[6]

Respondent argued that, based on an industry-wide study of construction industry employees issued by the Federal Mediation and Conciliation Service in 2000, the General Counsel should have utilized an average industry-wide number of hours

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[5] While there is disagreement among the parties about the willingness or unwillingness of Respondent to produce this large volume of date, I find it neither necessary nor profitable to inquire into the discussions which resulted in the use of the stipulated data for the purposes of backpay calculations.

[6] In its Answer, Respondent contended that the wage rates used for 1995 were too high, but it presented no evidence at trial to support this contention, nor to provide any basis for calculating a more accurate wage rate. As there was no proof to support this contention, the contention is rejected and the wage rate for 1995 which was used in the compliance specification is found to be the most accurate estimate possible.

worked annually in the construction industry. The study concerned shortages of skilled workers in the construction industry, and utilized at one point an average of approximately 1800 hours annually as a representative number. The comparable Respondent employee group used by the General Counsel worked over 2000 hours per year, figures which included overtime. Under Board law, the objective of backpay calculations is to approximate backpay which would have been earned while working for a specific respondent by this specific discriminatee, not averages from many unrelated employers. Respondent's argument is contradictory to its contention at trial that the most accurate measure should be used. Certainly use of an industry-wide average for all construction workers would be a far *less* accurate measure of backpay in this case than data drawn from a group of specific comparable employees who actually worked for this Respondent. I find that Respondent's argument that an industry-wide average should be used to calculate annual hours for the backpay period to be entirely without merit and must be rejected as yielding an inaccurate result.

c. "Attrition" Issue

Respondent argues that the comparable employee group should include employees who gradually ceased to work for Respondent. Respondent presented as a witness a statistician who had calculated the amount of hours which would have been worked by a typical group of employees who were subject to "attrition," in other words, worked less and less for Respondent as the years went by, due to various reasons such as death, injury, moving to other employers, etc. Respondent argued that the phenomenon of attrition is normal in any workforce. Assigning a hypothetical attrition rate to the comparable employee group would have the effect of gradually reducing gross backpay over the years, especially in the latter portion of the backpay period. There is limited application of this argument to the facts herein, as the majority of the quarters when net backpay is due the discriminatees falls early in the backpay period.

The General Counsel and the Charging Party argue that this argument was not included in Respondent's pleadings, and thus Respondent is technically precluded from making the argument. Section 102.56(b) of the Board's Rules and Regulations requires that as to all matters within the knowledge of a respondent, including the various factors entering into the computation of gross backpay, a general denial will not suffice. If a respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures. It is undisputed that Respondent did not include its Attrition argument in its answer, and did not produce supporting figures until the compliance trial. Indeed, Respondent could have retained its statistician far enough in advance of trial to have filed appropriate pleadings. I find that, under Section 102.56(b), Respondent is barred from asserting its Attrition argument. ***Power Equipment Co.,*** 341 NLRB No. 32, sl. op. at 2 (2004); ***Paolicelli,*** 335 NLRB 881, 883 (2001). I find that the General Counsel was reasonable in choosing as comparable employees those who worked regularly, and I find that Respondent may not assert its "attrition" argument in opposition.

Even if Respondent were permitted to make the argument, it contradicts one of the basic tenets of Board law regarding the calculation of backpay. Here, the discriminatees have been shown to have worked regularly for more than twelve years. Therefore, employees such as those who would be included in the comparable group under Respondent's theory, who have gradually dropped out of the work force because of retirement, death, ill health, or other reasons, are simply not comparable employees to the discriminatees, who did not drop out of the workforce for any reason. The three discriminatees continued to work in every quarter of the lengthy backpay period from the last quarter of 1990 through the end of the calculation. The hypothetical employees proffered by Respondent fail to meet the basic test of comparability. See, e.g., ***Performance Friction Corp.***, above.[7]

I find that Respondent's witness, while an expert in statistics, was admittedly entirely ignorant with respect to the Board's methods and standards for calculating backpay. As his expertise was limited to the presentation of the statistical calculations he had done, the usefulness of his testimony was confined to the "attrition" theoretical construction and the "seasonal" hypothetical construction. His testimony was largely irrelevant to any other issues in this case, and his opinions, if any exist in the record. are not admissible as to any legal issues, which are to be decided by the Board.

d. "Seasonality" Issue

Respondent advanced at trial, again through its statistician witness, an argument that the gross backpay calculations should have been distributed among the quarters for each calendar year on a "seasonal" basis, rather than divided in fourths for each year. Respondent's basis for this argument is that the discriminatees' interim earnings were distributed among the relevant quarters according to their actual quarterly interim earnings, that they showed seasonal variation, and that the gross backpay should be similarly varied. Again, Respondent did not plead this defense until the trial. It neither included the seasonality argument in its Answer, nor supplied supporting figures until the compliance trial. I find that Respondent is precluded by Section 102.56(b), from making the argument that the gross backpay should be unequally distributed among the quarters.

Even if I were to entertain this argument on its merits, I would find that it is inconsistent with Board policy. The General Counsel's method of dividing the annual hours into four equal quarters is the most accurate division possible under the

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[7] In any case, it would be Respondent's burden to show that the discriminatees did in fact leave the workforce for certain periods of time. ***McGuire Plumbing and Heating,*** above, footnote 1; ***Wellstream Corp.,***321 NLRB 455, 461 (1996). A hypothetical argument that a certain number of employees would leave the workforce does not prove that these specific discriminatees left the workforce. Respondent has stipulated that it did not contest the discriminatees' efforts to mitigate damages. In the face of the uncontested facts that the three discriminatees had earnings in every quarter from 1991 through the end of the calculated period, Respondent's argument based on hypotheses and averages is unavailing.

circumstances. Distribution of the annual hours unequally into the backpay quarters according to a hypothetical scheme based on the discriminatees' interim earnings and their alleged "seasonality" would be a *less accurate* measure of gross backpay than the one used by the General Counsel. The object of Board policy is to find a reasonable and *reasonably accurate* measure of gross backpay. I find that Respondent's late-raised scheme does not comport with this policy. ***F. W. Woolworth***, 90 NLRB 289 (1950).

I further find that Respondent is estopped from making the argument that the annual hours should be distributed unequally into the quarterly backpay periods according to a hypothetical scheme based on the seasonality of interim earnings. Respondent provided ONLY annualized data for backpay purposes. The provision of data reflecting only annual hours worked for the comparable employee group meant the General Counsel was unable accurately to calculate quarterly hours worked at Respondent reflecting differing numbers of hours for each quarter. Presented with ONLY an annual total of hours, the only reasonable way to assign the hours to particular quarters was to divide the total annual hours into four parts. The data which would have permitted a more accurate quarterly assessment of hours worked by the comparable employee group in each quarter of the backpay period was within Respondent's control. Respondent conceded at trial that it neither provided data embodying a quarterly breakdown of hours for the comparable employees nor did it urge the General Counsel prior to the compliance trial to assign the hours unequally to the quarters so as to reflect a hypothetical "seasonal" work year. Under these circumstances, Respondent cannot now argue for a hypothetical reconstruction of facts which it was within Respondent's power to provide, but which it did not provide.

B. Respondent's Burden of Proof

Respondent has the burden in a backpay proceeding of proving that it had effectively ended the backpay period by making valid offers of reinstatement to discriminatees. Such offers " must be specific, unequivocal, and unconditional." ***Adsco Manufacturing Corp***., 322 NLRB 217, 218 (1996). See also, ***Cobb Mechanical Contractors***, above, 333 at 1173. Here, Respondent has proffered three letters, one addressed to each of the three discriminatees herein. The letters are all dated December 26, 1991, and are identical except for the names and addresses and one other word.[8] According to the testimony of Jack West, director of human resources for

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[8] The text of the letters to J. Coons and S. Coons is as follows:

"Fluor Daniel extends to you a job offer of employment at the DuPont project, located on US Route 23 South, Circleville, Ohio, effective Monday January 6, 1992. You should report for work at 7:00am on January 6. The work schedule consists of 40 hours per weeks. The position offered is that of pipewelder, with a pay rate of $15.95 per hour.

As with all applicants at this project, pre-employment chemical screening is required. In addition, all non-certified applicants are required to pass a craft certification test, and if applicable, the required welder test (e.g. TIG, consisting of 2" schedule 80 carbon coupon, use 309 S.S. wire tack root and TIG all the way out; STICK consisting of Arkansas Bell Hole, 6010

Continued

craft employment in Respondent's human resources department, the letters existed in its business records. They were admitted as documents existing in the business records of Respondent. Charging Party argues that they were erroneously admitted because the custodian of records, although subpoenaed by the Charging Party, did not appear to give testimony about these and other records. I find that the records were properly admitted as documents, which existed in the business records of Respondent.

The letters, however, are attached to express mail records showing the initials "M.S.". There was no evidence proffered by Respondent to show whose initials appear on the receipts, and no witness was called by Respondent to testify to the letters having been mailed, nor to Respondent's business practice with regard to such mailings at the time the exhibits are dated. West was employed overseas for the years in question, and therefore had no knowledge of these facts. In addition, the handwritten notes purporting to come from J. Coons and S. Coons, which were attached to the offer letters were not authenticated by anyone familiar with the signatures contained in them. No explanation was offered by Respondent as to why such a witness was not called, nor why it did not subpoena the discriminatees themselves for this purpose. As the Charging Party argues, there is a lack of any evidence that the purported offers of employment were mailed to the discriminatees. I cannot find on this record that Respondent has carried its burden of proving that the purported offers of employment were ever actually mailed to the discriminatees.

Even assuming that Respondent could show that it had made the offers in question, they would not, under well-established Board law, operate to end the backpay periods. The letters refer to the three discriminatees as "applicants," thereby implying that they are not offers of jobs, but only a possibility of employment. The job offers are conditioned on the discriminatees passing a drug test, a requirement that was undisputedly not in force at the BR jobsite where Bolen was employed and where the Coons brothers were unlawfully denied employment. The job offers are also conditioned on the taking of a welding test. As Bolen was already employed, this was clearly an additional condition on his offer. As to the Coons brothers, the Board's decision clearly found that the welding test was applied inconsistently at the BR jobsite, with some employees taking a retest, and some employees taking no test at all. The welding test is also a condition, which would not necessarily have obtained at the BR jobsite. Finally, the letter conditions acceptance of the purported job offer on the return of a postcard to Respondent "within a few days." Given that the letters were dated during the holiday period between Christmas and New Years Day, such a requirement would have given the discriminatees only a very short time to respond to the job offer. The Board has held that such a short response time, as well as the conditional nature of the letters, render them invalid to end the backpay period. See, e.g., ***Cassis***

Root and Pass 7018 filler and cap).

If you wish to accept this job offer you must complete and mail the enclosed card within the next few days. If you have any questions feel free to call me at the number on the enclosed card." The letter to Bolen was identical except that it stated in the first paragraph that the position offered was that of pipefitter.

Management Corp., 336 NLRB 961, 970 (2001); ***American Tissue Corp.,*** 336 NLRB 435, 447-448 (2001); ***Performance Friction Corp.***, above, 335 at 1124-1125, footnote 35; ***Cobb Mechanical Contractors,*** above, 333 at 1173; ***Halle Enterprises,*** 330 NLRB 1157 (2000).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Fluor Daniel, Inc., its officers, agents, successors, and assigns, shall pay backpay to the employees named below the indicated amounts of net backpay and other reimbursable sums with interest as computed in ***New Horizons for the Retarded***, 283 NLRB 1173 (1987), and less taxes required by law to be withheld:

John H. Coons	$	32,566.54
Stephen S. Coons	$	43,579.84
David Scott Bolen	$	18,442.05

IT IS FURTHER ORDERED that Respondent shall take the following affirmative action:

Offer immediate reinstatement to David Scott Bolen to his former position or if that position no longer exists, to a substantially equivalent position, with the same seniority and benefits he would have enjoyed if he had been continuously employed by Respondent, and make him whole for all losses he suffered after the backpay period computed in the compliance specification, because Respondent has not made a valid offers of reinstatement to him.

Offer immediate instatement to John H. Coons and Stephen S. Coons to the positions for which they applied or if those positions no longer exist, to substantially equivalent positions, with the same seniority and benefits they would have enjoyed if they had been continuously employed by Respondent, and make them whole for all losses they suffered after the backpay periods computed in the compliance specification, because Respondent has not made valid offers of reinstatement to them.

Respondent shall continue to be liable for backpay until such time as it makes a sufficient reinstatement offer to Bolen and sufficient instatement offers to J. Coons and S. Coons.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated, Washington, D.C. June 7, 2004.

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Jane Vandeventer
Administrative Law Judge